STATE OF MICHIGAN

COURT OF APPEALS

MATRIX CONSTRUCTION, LLC,

Plaintiff-Appellant,

v

BARTON MALOW,

Defendant-Appellee,

and

SCHOOLCRAFT COLLEGE,

Defendant.

UNPUBLISHED
February 21, 2006

No. 265156
Wayne Circuit Court
LC No. 04-429506-CK

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

In this construction case, plaintiff, Matrix Construction, LLC, appeals the trial court's grant of summary disposition to defendant Barton Malow pursuant to MCR 2.116(C)(8) and the trial court's denial of Matrix's motion to amend its complaint. We affirm.

I. Facts and Procedural History

This case arises out of the construction of the Business and Industry Information Technology Center at Schoolcraft College's Livonia campus. Schoolcraft and Matrix entered a contract on October 23, 2001, for Matrix to furnish and install numerous items for the construction project. Barton Malow also entered a contract with Schoolcraft to function as the construction manager for the project. On September 21, 2004, Matrix filed a complaint against Barton Malow and alleged that the company negligently managed the project by failing "to properly supervise, coordinate, plan and schedule the work performed on the [p]roject."[1]

[1] Matrix also named Schoolcraft in the complaint and alleged that the school breached its contract with Matrix when it failed to pay for all of the labor and materials Matrix supplied for the project. Matrix also asserted claims against Schoolcraft of abandonment, cardinal change, (continued…)

According to Matrix, Barton Malow's negligent supervision delayed completion of the project and caused Matrix to incur increased costs.

Barton Malow filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and argued that Matrix failed to state a claim on which relief can be granted because Barton Malow owed no duty to Matrix as a matter of law. Specifically, Barton Malow asserted that any duty it had with regard to the project arose solely under its contract with Schoolcraft and that Matrix may not maintain a tort action for Barton Malow's alleged failure to perform its work in accordance with the terms of its contract with a third party. Barton Malow further maintained that Matrix's claim must fail because Matrix was not a third-party beneficiary under Barton Malow's contract with Schoolcraft. In response, Matrix reasoned that, under Michigan law, a construction manager that supervises or controls a construction project owes a duty to subcontractors, regardless whether the subcontractor is in privity of contract with the construction manager. Matrix further clarified that it did not intend to assert a claim as a third-party beneficiary to Barton Malow's contract with Schoolcraft. However, Matrix claimed that it stated a valid claim against Barton Malow because case law holds that the negligent performance of a contractual obligation gives rise to a cause of action in tort if the defendant's malfeasance causes injury to another.

The trial court granted summary disposition to Barton Malow in an order entered on July 6, 2005.[2] Thereafter, Matrix sought to file an amended complaint to allege that Barton Malow assumed and breached a duty to Matrix and that Barton Malow made negligent misrepresentations to Matrix during the project. Barton Malow responded and argued that the amendment would be futile because, again, the duty alleged by Matrix arose solely under Barton Malow's contractual obligations to Schoolcraft. The trial court denied Matrix's motion to amend on July 22, 2005.

II. Analysis

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). As this Court further explained in *Rorke v Savoy Energy, LP*, 260 Mich App 251, 253; 677 NW2d 45 (2004):

> A motion brought under MCR 2.116(C)(8) tests the "legal sufficiency of the complaint" and permits dismissal of a claim if the opposing party has failed to state a claim on which relief can be granted. Only the pleadings are examined; documentary evidence is not considered. If the claim is clearly unenforceable as a

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(…continued)

rescission, quantum meruit, and it sought an equitable lien on the project. On December 22, 2004, the parties stipulated to dismiss Schoolcraft from the lawsuit pursuant to an arbitration provision in Schoolcraft's contract with Matrix. None of the claims against Schoolcraft are at issue in this appeal.

[2] The trial court signed an order that denied Matrix's motion for reconsideration on August 31, 2005.

> matter of law and no factual development could lead to recovery, a motion under MCR 2.116(C)(8) should be granted. [Citations omitted.]

As our Supreme Court observed in *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004):

> It is well-established that a prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96 n 10; 485 NW2d 676 (1992). The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997).

Whether a defendant owes a duty to the plaintiff is a question of law that this Court reviews de novo. *Fultz, supra* at 463.

It is undisputed that there is no contract between Matrix and Barton Malow that would give rise to a duty on the basis of a contractual relationship. Rather, Matrix asserts that, as the construction manager, Barton Malow owed Matrix and other contractors a common law duty to properly supervise and control the project.

To support its position, Matrix primarily relies on *Bacco Construction Co v American Colloid* Co, 148 Mich App 397; 384 NW2d 427 (1986), abrogated on other grounds *Nat'l Sand, Inc v Nagel Const, Inc*, 182 Mich App 327; 451 NW2d 618 (1990). In *Bacco*, the general contractor (Bacco), entered a contract with Houghton County to construct waste water lagoons. *Id*. at 402. Bacco sued the project engineer McNamee, Porter & Seely (MPS), for negligence because MPS changed the specifications of the contract and directed Bacco to use a different sealant for construction of the lagoons. *Id*. Bacco used the sealant specified by MPS and, after testing, the seal did not meet contract specification standards and a major leak developed. Id. at 402-403. The County rejected Bacco's work and Bacco incurred expenses to correct the problem. *Id*. at 403. Bacco's complaint specifically alleged that MPS breached a duty "to use reasonable care in the selection, testing and approval of materials, as well as the selection, approval and supervision of the methods and manner in which the materials were installed." *Id*. at 413.

The trial court dismissed Bacco's negligence claim because it ruled that MPS did not owe Bacco a legal duty. *Id*. at 404. In reviewing the issue on appeal, this Court first observed that other jurisdictions have held that a contractor may maintain an action against an engineer or architect in the absence of a direct contractual relationship. *Id*.a t 414. With regard to an engineer's duty to a contractor, the *Bacco* Court further noted that "[i]t is certainly foreseeable that an engineer's failure to make proper calculations and specifications for a construction job may create a risk of harm to the third-party contractor who is responsible for applying those specifications to the job itself." *Id*. at 416. The Court also relied on cases from other states in which engineers or architects were held liable in tort and it adopted the reasoning in *Donnelly Construction Co v Oberg/Hunt/Gilleland*, 139 Ariz 184; 677 P2d 1291 (1984). *Id*. at 416. The *Bacco* Court explained:

> In *Donnelly* . . . where a contractor brought suit against architects alleging that errors in plans and specifications prepared by the architects resulted in increased cost of construction, the court held that the contractor had stated a cause of action for negligence, since it was foreseeable that the contractor, hired to follow the plans, would incur increased costs if those plans were not accurate, in spite of the lack of privity of contract. The court held that design professionals are liable for foreseeable injuries to foreseeable victims which proximately result from negligent performance of their professional duties. [*Id*.]

Accordingly, the Court ruled that Bacco stated a valid negligence claim against MPS because, as an engineer, MPS owed a duty of due care to Bacco with regard to its material calculations and specifications. *Id*. at 416.

We hold that *Bacco* is inapplicable because, here, Matrix admits that Barton Malow merely acted as the construction manager for the project, not a "design professional" that disseminates plan specifications and calculations. Further, Matrix does not allege that Barton Malow undertook any duties separate and distinct from Barton Malow's contract with Schoolcraft. Indeed, Matrix's allegations only relate to Barton Malow's duty to properly perform its work in accordance with the terms and conditions of its contract with Schoolcraft.

Our Supreme Court has clarified that, in analyzing a tort action based on a contract brought by a non-party to the contract, "the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Fultz, supra* at 467.[3] Matrix has not alleged that Barton Malow had "a duty to act that is separate and distinct from the promise made" to Schoolcraft to supervise, coordinate, and schedule the work performed on the construction project. Rather, Matrix's claims arise only out of Barton Malow's alleged negligence in its planning and coordination of the project.[4] As our Supreme Court explained in *Rinaldo's Const Corp v Michigan Bell Telephone Co*, 454 Mich 65; 559 NW2d 647 (1997), in those cases in which a cause of action was found:

> [I]n each a situation of peril [was] created, with respect to which a tort action would lie without having recourse to the contract itself. Machinery [was] set in motion and *life or property [was] endangered* . . . In such cases . . . we have a "breach of duty distinct from ... contract." Or, as Prosser puts it ... "if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not." [*Id*. at 83-84, quoting *Hart v Ludwig*, 347 Mich 559; 565; 79 NW2d 895 (1956) (emphasis in *Rinaldo's*).]

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[3] We reject Matrix's argument that the question of Barton Malow's duty should be analyzed in light of whether misfeasance or nonfeasance has been alleged. Our Supreme Court rejected this analysis in *Fultz* and concluded that the correct inquiry is based on whether a plaintiff has alleged a "separate and distinct" duty outside the contract. *Fultz, supra* at 466-467.

[4] We find Matrix's citations to cases from other jurisdictions unpersuasive because the cases do not follow Michigan's well-established principles to determine whether a duty exists under these factual circumstances.

Here, clearly, no relation between Matrix and Barton Malow existed that gave rise to a legal duty by Barton Malow without enforcing Barton Malow's contract with Schoolcraft. In other words, as in *Rinaldo's*, "[w]hile plaintiff's allegations arguably make out a claim for "negligent performance" of the contract, there is no allegation that this conduct by the defendant constitutes tortious activity in that it caused physical harm to persons or tangible property; and plaintiff does not allege violation of an independent legal duty distinct from the duties arising out of the contractual relationship." *Rinaldo's, supra* at 85. Barton Malow did not owe any recognized separate and distinct duty to Matrix as a matter of law and, therefore, the trial court correctly granted summary disposition to Barton Malow. [5]

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Henry William Saad

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[5] For similar reasons, the trial court correctly denied Matrix's motion to amend its complaint. We review for an abuse of discretion a trial court's denial of a motion to amend a complaint. *Tierney v University of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). Pursuant to MCR 2.116(I)(5), "[i]f the grounds asserted are based on subrule (C)(8), (9) or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." "Our Supreme Court has held that an amendment is not justified if it would be futile." *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2004), citing *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Here, the trial court ruled that Matrix's proposed amendment would be futile. The only change Matrix made to the complaint was to assert that Barton Malow negligently obtained or communicated information during its coordination and supervision of the construction project. Again, this duty arose solely from Barton Malow's contractual obligations to Schoolcraft and Matrix did not allege a separate and district duty that arose outside of that agreement. Accordingly, the trial court correctly ruled that the proposed amendment would be futile.